


4-15-2001

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Recommended Citation

Nicholas P. Consula *The First Amendment, Gaming Advertisements, and Congressional Inconsistency: The Future of the Commercial Speech Doctrine after Greater New Orleans Broadcasting Ass'n v. United States*, 28 Pepp. L. Rev. Iss. 2 (2001)

Available at: <https://digitalcommons.pepperdine.edu/plr/vol28/iss2/3>

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The First Amendment, Gaming Advertisements, and Congressional Inconsistency: The Future of the Commercial Speech Doctrine after *Greater New Orleans Broadcasting Ass'n v. United States*¹

I. INTRODUCTION

The commercial speech doctrine is the stepchild of first amendment jurisprudence: Liberals don't much like commercial speech because it's commercial; conservatives mistrust it because it's speech. Yet, in a free market economy, the ability to give and receive information about commercial matters may be as important, sometimes more important, than expression of a political, artistic, or religious nature.²

The First Amendment of the United States Constitution declares that "Congress shall make no law . . . abridging the freedom of speech."³

One cannot doubt the importance of this declaration against the vicissitudes in American history. Since its enactment through the Bill of Rights in 1791, the First Amendment has served not only as a catalyst in the evolution of American culture but also as a rooted concept of American democracy. While the First Amendment continues to characterize the United States as a social and political institution, commercial advertising has served to define the United States as an economic institution. Capitalism and the free-market thrive on the notion of uninhibited access to all information.⁴ Only then can a consumer make a well-informed economic decision amongst varying alternatives.⁵

Although capitalism characterizes the United States as a nation, the Supreme Court has never fully endorsed equating the rationale behind the First Amendment

1. 527 U.S. 173 (1999).

2. Alex Kozminski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627, 652 (1990).

3. U.S. CONST. amend. I.

4. See generally THOMAS SOWELL, KNOWLEDGE & DECISIONS 3-20 (1980) (describing the role of knowledge, ideas, and decisions and how they are influenced by social institutions).

5. See *id.*

as fully protecting commercial advertising.⁶ In the beginning, the Supreme Court resisted considering commercial speech as deserving any First Amendment protection. Over the years, the Supreme Court has gradually balanced the interests of both concepts by extending the reach of the First Amendment to include some commercial speech. A doctrine of commercial speech has emerged and continued to evolve to maintain this balance. Meanwhile, as the United States progressed from a regional, to a national, to a global economy, Congress has found the pervasiveness of commercial speech an important potential alternative to regulating commerce without directly regulating the underlying conduct of a business.⁷ Thus, competing interests and uncertain Supreme Court decisions have developed to complicate the breadth of the commercial speech doctrine.⁸

This Note explores the Court's decision in *Greater New Orleans Broadcasting Ass'n v. United States*⁹ and discusses the implications of the Court's determination that the First Amendment permits lawful casinos to broadcast truthful, non-misleading gaming advertisements.¹⁰ Part II provides an introduction into the development of the commercial speech doctrine,¹¹ examines Congress' inconsistency in regulating gaming advertisements,¹² and traces lower courts' treatment of the *Central Hudson* test as it applies to such advertisements.¹³ Part III presents the facts and procedural history of *Greater New Orleans*¹⁴ and is followed by an analysis of the majority and concurring opinions in Part IV.¹⁵ Part V considers *Greater New Orleans*' judicial, legislative, and social impact.¹⁶ Part

6. Dana M. Shelton, Recent Development, 70 TUL. L. REV. 1725, 1725-26 (1996). "The rationale underlying the disparate treatment of commercial speech is founded on the idea that, unlike political speech, commercial speech is not essential to the maintenance of a legitimate, viable democracy and an informed, active public." *Id.* (citing ERIC BARENDT, FREEDOM OF SPEECH 55 (1985)); see also Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 784-87 (1976) (Rehnquist, J., dissenting) (stating that although economic efficiency is an important interest, such an interest does not necessarily transform it into a First Amendment interest).

7. See William D. O'Neill, Note, *Governmental Restrictions on Beverage Alcohol Advertising After 44 Liquormart v. Rhode Island*, 42 ST. LOUIS U. L.J. 267, 267 (1998). Interestingly, Congress need only provide a rational basis to regulate the underlying conduct of a business, as opposed to a much more demanding burden with regards to the advertising of such conduct. See e.g., *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938) (providing that regulatory legislation regarding commerce need only satisfy a rational basis). The attractiveness of regulating advertising, however, appears to lie in the inconsistency of the Court to determine a concrete standard in regulating commercial speech and the pervasiveness of advertising as a tool for dictating and influencing consumer choice. Daniel E. Troy, *Advertising: Not a "Low Value" Speech*, 16 YALE J. ON REG. 85, 89, 142 (1999) [hereinafter "Troy, Advertising"].

8. See Troy, Advertising, *supra* note 7, at 142.

9. 527 U.S. 173 (1999).

10. See *id.* at 176.

11. See *infra* notes 18-113 and accompanying text.

12. See *infra* notes 114-128 and accompanying text.

13. See *infra* notes 129-141 and accompanying text.

14. See *infra* notes 142-158 and accompanying text.

15. See *infra* notes 159-202 and accompanying text.

16. See *infra* notes 203-248 and accompanying text.

VI concludes with an overview of the commercial speech doctrine in light of the Court's decision in *Greater New Orleans*.¹⁷

II. HISTORICAL ANALYSIS

A. *Origins of Commercial Speech*

As a general matter, traditional First Amendment jurisprudence delineates speech restrictions into two categories: content-based and content-neutral abridgements.¹⁸ Content-based abridgements are presumptively unconstitutional.¹⁹ When analyzing content-based abridgements, unless a more specific, well-settled analysis is applicable,²⁰ the Court utilizes a strict scrutiny, compelling state interest standard of review.²¹ This demanding analysis requires the government to demonstrate that the abridgement under review is narrowly tailored to meet a compelling state interest.²² Content-neutral abridgements, on the other hand, involve less demanding judicial scrutiny,²³ because such abridgements originate from an indirect, rather than direct burden on the First Amendment.²⁴ In analyzing content-neutral restrictions, the Court utilizes a balancing test, weighing the non-speech interests against the right to free speech to determine if the First Amendment abridgement is reasonable.²⁵

Commercial speech, however, is not easily reconcilable with traditional First Amendment jurisprudential scrutiny. The First Amendment has not traditionally embraced commercial speech.²⁶ In 1942, the Supreme Court in *Valentine v. Chrestensen*, in merely three pages, established an outright distinction between

17. See *infra* Part VI, note 249 and accompanying text.

18. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).

19. *Id.*

20. See, e.g. *Miller v. California*, 413 U.S. 15 (1973) (obscene speech analysis); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (clear and present danger speech analysis); *N. Y. Times Co. v. Sullivan* 376 U.S. 254 (1964) (defamatory speech analysis); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (fighting words analysis).

21. *Perry Educ. Ass'n. v. Perry Local Educators' Ass'n.*, 460 US 37, 45-46 (1983) (requiring a showing of compelling state interest to uphold the constitutionality of a content-based regulation limiting access to interschool mail systems).

22. *Id.* See generally LAWRENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-2 (2d ed. 1988) (describing the distinction between content-neutral (noncommunicative impact) and content-based (communicative impact) First Amendment abridgements).

23. TRIBE, *supra* note 22, § 12-2, at 791-92.

24. *Ward v. Rock Against Racism*, 491 U.S. 781, 791-92 (1989).

25. *Id.* at 792-803; see generally TRIBE, *supra* note 22, § 12-2, at 791-92 (describing the distinction between content-neutral (noncommunicative impact) and content-based (communicative impact) First Amendment abridgements).

26. See, e.g. *Valentine v. Chrestensen*, 316 U.S. 52 (1942).

commercial and non-commercial speech.²⁷ The Court, "without citing precedent, historical evidence, or policy considerations,"²⁸ relegated commercial speech, which included advertising, outside of the scope of the First Amendment.²⁹

The idea that anything "commercial" falls completely outside the First Amendment appeared to change in 1943.³⁰ In that year, the Supreme Court in *Murdock v. Pennsylvania* protected door-to-door selling of religious materials.³¹ The Court indicated that a city "may not prohibit the distribution of handbills in the pursuit of a clearly religious activity merely because the handbills invite the purchase of books."³² *Murdock* limited a broad application of *Chrestensen* by providing that the exercise of the First Amendment could not be circumscribed simply because of an incidental commercial aspect.³³ Moreover, in 1964, the Court in *New York Times Co. v. Sullivan*³⁴ found an advertisement informing southern Negro students of their constitutional rights, accompanied by an appeal for funds, was still within the purview of the First Amendment.³⁵ The Court asserted that simply because the advertisement was a paid advertisement and solicited funds did not bar it from First Amendment protection.³⁶ Although the Court maintained that a commercial advertisement could fall under the First Amendment, the Court stopped short of overruling *Chrestensen* and treading new ground.³⁷ Both *Murdock* and *New York Times* revealed the Court's evolving

27. *Id.* at 54-55. In *Chrestensen*, the plaintiff sought to enjoin the police commissioner from enforcing a city ordinance forbidding the distribution of commercial handbills on city streets. *Id.* at 53. Moreover, after the plaintiff learned he was barred from distributing handbills soliciting patrons for a tour of his submarine, he distributed the handbills once again with his advertisement on one side, without a mention of admission price, and a message on the other side protesting the City's denial of wharfage facilities. *Id.* Although the flip side of the plaintiff's handbill most likely demonstrated pure First Amendment protected speech, the Court focused on the motive in making its determination that commercial speech lies outside of the protections of the First Amendment. *Id.* at 55.

28. Martin H. Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429, 450 (1971).

29. *Chrestensen*, 316 U.S. at 54-55. "[T]he Constitution imposes no such restraint on government as respects purely commercial advertising." *Id.* at 54.

30. *Murdock v. Pennsylvania*, 319 U.S. 105, 111 (1943).

31. *Id.* at 106, 111, 116.

32. *Id.* at 111. "The right to use the press for expressing one's views is not to be measured by the protection afforded commercial handbills. It should be remembered that the pamphlets of Thomas Paine were not distributed free of charge." *Id.*

33. *Id.* "Although *Murdock* did limit somewhat the reach of the *Chrestensen* doctrine it left unclear how a court should determine the 'primary purpose' of a communication." JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 16.28 n.7 (4th ed. 1991).

34. 376 U.S. 254 (1964).

35. *Id.* at 256-57, 265-66.

36. *Id.* at 266. "That the Times was paid for publishing the advertisement is as immaterial in this connection as is the fact that newspapers and books are sold." *Id.*

37. *Id.* at 266. Instead, the Court maintained that

[t]he publication here was not a "commercial" advertisement in the sense in which the word was used in *Chrestensen*. It communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern.

Id. As opposed to *Murdock*, the Court in *New York Times* appeared to disregard the motive of the

distinction regarding the quality of commercial speech: purely commercial speech vs. commercial speech purporting to further a redeemable interest.³⁸

The Supreme Court grappled with distinctions between commercial and non-commercial speech again in 1973.³⁹ In *Pittsburgh Press Co. v. Pittsburgh Commission of Human Relations*, the Court officially put to rest the proposition that commercial speech hinged on the motivation of the speaker.⁴⁰ The Court instead placed the emphasis on content.⁴¹ In particular, the Court indicated its disfavor of speech that advocated an illegal commercial activity—employment discrimination based on sex.⁴² Moreover, in 1978, the Court in *National Society of Professional Engineers v. United States*⁴³ similarly indicated its disfavor of speech that promoted an illegal commercial activity.⁴⁴ Again, although no set standard evolved to determine what actually constitutes commercial speech, the Court's determinations in individual cases began to provide examples of what was not commercial speech.⁴⁵

In 1975, the Court in *Bigelow v. Virginia*⁴⁶ made a significant contribution in the quest for deciphering commercial speech. The *Bigelow* Court struck down a state statute that made it a misdemeanor to advertise, and allegedly encourage, abortion.⁴⁷ In refusing to uphold the statute that prohibited an advertisement accurately pertaining to lawful, yet socially controversial conduct,⁴⁸ the Court

commercial advertisement in determining the reach of the First Amendment. See NOWAK, *supra* note 33, § 16.29. Instead, the Court focused more on the content of the advertisement rather than its purpose. *Id.*

38. Bernard James, *Can the Federal Government Continue to Ban Truthful, Nonmisleading Broadcasts of Casino Gambling Ads?*, 1999 PREVIEW U.S. SUP. CT. CAS. 414, 415 (1999).

39. *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973).

40. Jason Edward Lavender, Note, "*Tobacco is a Filthy Weed and From the Devil Doth Proceed*": A Study of the Government's Efforts to Regulate Smoking on the Silver Screen, 21 HASTINGS COMM. & ENT. L.J. 205, 210 (1998).

41. *Id.*

42. *Pittsburgh Press*, 413 U.S. at 388-89. *Pittsburgh Press* involved a complaint by The National Organization for Women that alleged that the Pittsburgh Press violated a city ordinance prohibiting gender-designated help-wanted columns. *Id.* The Court dismissed the newspaper's First Amendment challenge and upheld the constitutionality of the city ordinance. *Id.* However, the Court specifically narrowed its holding to illegal advertisements—gender-specific, nonexempt job opportunities. *Id.* at 391.

43. 435 U.S. 679 (1978).

44. *Id.* at 697. In *National Society*, the Court held that a policy created by an association of professional engineers which prohibited competitive bidding by the association's members was in violation of the Sherman Anti-Trust Act. *Id.* Further, the Court did not find it a violation of the First Amendment to prohibit the association from "adopting any official opinion, policy statement, or guideline stating or implying that competitive bidding is unethical." *Id.* at 696-97. The Court stated that the district court was allowed to prohibit such conduct "to avoid a recurrence of the violation and to eliminate its consequences. *Id.* at 697.

45. James, *supra* note 38, at 415.

46. 421 U.S. 809 (1975).

47. *Id.* at 811-12, 829.

48. *Id.* at 828-29.

dismissed the rationale that such an advertisement did not deserve First Amendment protection principally because it was a paid advertisement that involved a commercial interest.⁴⁹ Although the Court in *Bigelow* stressed that advertising, as such, was not void of First Amendment protection, the Court explicitly declined to address "the precise extent to which the First Amendment permit[ted] regulation of advertising that is related to activities the State may legitimately regulate or even prohibit."⁵⁰ In the following term, for the first time, the Supreme Court, in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council Inc.*,⁵¹ overtly recognized the First Amendment as protecting commercial speech.⁵² The Court affirmed the inference from *Bigelow*⁵³ that the government could not "completely suppress the dissemination of concededly truthful information about entirely lawful activity, fearful of that information's effect upon its disseminators and its recipients."⁵⁴ Interestingly, the Court employed a rather pro-capitalist rationale by indicating that the best method of protecting consumers interests was through more, rather than less, information.⁵⁵

Although 1976 saw the *Virginia Citizens* Court conspicuously recognize commercial speech under the First Amendment, the Court did nothing more than provide limited examples of situations where commercial speech regulations were permissible.⁵⁶ As a consequence, the Court failed to provide any significant consistency or a level of scrutiny to apply in future cases.⁵⁷

49. *Id.* at 818. "The fact that it had the effect of banning a particular handbill does not mean that *Chrestensen* is authority for the proposition that all statutes regulating commercial advertising are immune from constitutional challenge." *Id.* at 819-20. Moreover, the Court, in a footnote, discussed Justices Douglas, Brennan, Stewart, Marshall, Powell, and Burger's discontent over the distinction between commercial and non-commercial speech espoused in *Valentine v. Christensen*. See *id.* at 820 n.6.

50. *Id.* at 825.

51. 425 U.S. 748 (1976). In *Virginia Citizens*, consumers of prescription drugs successfully challenged the constitutionality of a Virginia statute that prohibited pharmacists from advertising the prices of prescription drugs. *Id.* at 749-750. The state legislature contended that such a prohibition was necessary in maintaining the professional standards of licensed pharmacists. *Id.* at 766.

52. *Id.* at 770. The Court added that simply because the speech involved was purely economic did not disqualify the advertiser from First Amendment protection. *Id.* at 762.

53. However, the Court distinguished *Virginia Citizens* from *Bigelow* in that *Bigelow* involved a socially controversial activity that did more than simply propose a commercial transaction, whereas *Virginia Citizens* involved more of a purely commercial activity. *Id.* at 760-61.

54. *Id.* at 773; *Linmark Assoc., Inc. v. Township of Willingboro*, 431 U.S. 85, 98 (1977) (stating that the government may not impede "the flow of truthful and legitimate commercial information" in the context of prohibiting the posting of "For Sale" and "Sold" signs).

Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.

Va. Citizens, 425 U.S. at 765.

55. *Va. Citizens*, 425 U.S. at 766-70.

56. *Id.* at 770-71.

57. *Id.* at 770-20.

B. The Central Hudson Test

In 1980, the Supreme Court in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*,⁵⁸ espoused a First Amendment jurisprudential standard that provided a benchmark by which all laws effecting commercial speech would be analyzed.⁵⁹ In *Central Hudson*, the Court held that a New York Public Service Commission regulation, which banned all promotional advertising by an electrical utility, violated the First Amendment.⁶⁰ In holding the ban unconstitutional, the Court reasoned that the Constitution did not afford commercial speech pure First Amendment protection.⁶¹ The Court indicated that the protection available for commercial speech rested on the "nature both of the expression and of the governmental interests served by its regulation."⁶²

To preserve this relationship, the Court established a four-pronged standard by pulling together some of the interests espoused in earlier cases.⁶³ In order to determine whether the Commission's regulation violated the electrical company's First Amendment rights, the Court adopted an analytical test that considered: (1) whether the speech at issue is not misleading and concerns a lawful activity, and (2) whether the state's interest in regulating such speech is substantial.⁶⁴ If both prongs are answered in the affirmative, then the court must also ask: (3) whether the state's regulation directly advances the state's asserted interest, and (4) whether the regulation is no more extensive than necessary in effectuating the state's interest.⁶⁵

In applying the newly bundled analysis to the facts of *Central Hudson*, the Court first asserted that the utility's advertisements were truthful and concerned a lawful activity.⁶⁶ Next, the Court agreed that the Commission's two interests in promoting energy conservation and establishing a fair rate were substantial.⁶⁷ The Court then determined that the ban directly advanced the Commission's interest in reducing energy consumption, but could not agree that the Commission's ban

58. 447 U.S. 557 (1980).

59. *Id.* at 566.

60. *Id.* at 571-72.

61. *Id.* at 562-63.

62. *Id.* at 563.

63. *Id.* at 562-66.

64. *Id.* at 566.

65. *Id.*

66. *Id.*

67. *Id.* at 568-69.

also did the same for establishing a fair rate structure.⁶⁸ Under the fourth prong, however, the Court concluded that there were many other less restrictive policies the Commission could have employed to advance its interest in promoting conservation.⁶⁹

In controversies subsequent to *Central Hudson*, the self-titled test has been classified and utilized as a mid-tier or intermediate level of scrutiny test for determining a regulation's First Amendment constitutionality.⁷⁰ Thus, the *Central Hudson* test lies in the constitutional abyss, somewhere between the deferential rational basis test the Court uses for regulating health, safety, welfare, and morals and the restrictive strict scrutiny test used for, inter alia, assessing pure First Amendment speech interests.⁷¹

C. Application of the Central Hudson Test

In the years following the *Central Hudson* decision, the Court utilized the commercial speech analysis to strike down unconstitutional attempts to restrict commercial speech.⁷² However, not all was settled in commercial speech jurisprudence. The *Central Hudson* analysis began to exhibit some instability and needed fine-tuning regarding the "fit" (prong three) and "scope" (prong four) restrictions.⁷³ The cases that follow identify the Court's inconsistency and tension in determining the extent of protection afforded under the *Central Hudson* test.

In 1986, the Court in *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*⁷⁴ upheld the constitutionality of a statute that prohibited advertisements of casino gambling targeted at residents of Puerto Rico but not at prospective tourists of Puerto Rico.⁷⁵ Interestingly, the Court gave great deference to the government's factually unsubstantiated assertions under prong three of *Central Hudson*: that prohibiting advertisements would decrease the demand for casino gambling and decrease the parasitic evils that are allegedly associated with casino gambling.⁷⁶ Additionally, the Court, under prong four of

68. *Id.* at 569. Under the third prong, the Court found that the Commission's interest was directly advanced because "Central Hudson would not contest the advertising ban unless it believed that promotion would increase sales." *Id.* at 569.

69. *Id.* at 570-71. Under the fourth prong, the Court found that the Commission failed to show that "a more limited restriction on the content of promotional advertising would not serve adequately the [Commission's] interest." *Id.* at 570.

70. Diane Ritter, Note, *The First Amendment, Commercial Speech, and the Future of Tobacco Advertising After 44 Liquormart, Inc. v. Rhode Island*, 43 WAYNE L. REV. 1505, 1513 (1997).

71. *Id.* at 1511-13.

72. *Id.* at 1511.

73. See *infra* notes 74-78 and 85-90 and accompanying text.

74. 478 U.S. 328 (1986).

75. *Id.* at 330-31.

76. *Id.* at 341-42.

The Puerto Rico Legislature obviously believed, when it enacted the advertising restrictions . . . that advertising of casino gambling aimed at the residents of Puerto Rico would serve to increase the demand for the product advertised. We think the legislature's belief is a reasonable

Central Hudson, again substantiated this deferential view by adding that "the [legislature's] greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling."⁷⁷ As a result of the Court's deferential stance under the third and fourth prong of *Central Hudson*, the Court relegated the test from one of intermediate scrutiny to a more deferential rational basis test.⁷⁸

In 1993, the Court handed down three significant commercial speech cases.⁷⁹ Although all three cases were handed down in the same term, the significance lies not in their sheer volume, but in the dissimilarity of the Court's application of the *Central Hudson* test.

In *City of Cincinnati v. Discovery Network, Inc.*,⁸⁰ the Court struck down a government ordinance prohibiting the dissemination of commercial handbills on public property.⁸¹ In *Discovery Network*, the Court declined to give deference to the government's factually unjustifiable assertions that the regulation "reasonabl[y] fit" the government's purpose.⁸² The Court noted that the city's use of the ordinance would merely remove 62 newsracks out of the existing 1,500 to 2,000.⁸³ The Court found that removing such a small number of newsracks would do little to increase the city's interest in preserving aesthetics.⁸⁴

In *Edenfield v. Fane*,⁸⁵ the Court struck down a Florida statute prohibiting uninvited solicitation by certified public accountants.⁸⁶ Consistent with the anti-deferential stance of *Discovery Network*, the Supreme Court noted that *Central Hudson* required "[t]he party seeking to uphold a restriction on commercial speech carr[y] the burden of justifying it."⁸⁷ The Court also asserted that "[t]his burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that

one, and the fact that appellant has chosen to litigate this case all the way to this Court indicates that appellant shares the legislature's view.

Id.

77. *Id.* at 346-47.

78. See Ritter, *supra* note 70, at 1514-15.

79. *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993); *Edenfield v. Fane*, 507 U.S. 761 (1993); *United States v. Edge Broad. Co.*, 509 U.S. 418 (1993).

80. 507 U.S. 410 (1993).

81. *Id.* at 424.

82. *Id.* at 417, 430. In an effort to promote the safety and esthetics of Cincinnati's city streets, the city refused to renew the plaintiffs'—commercial publishers'—permits to display their commercial publications using freestanding newsracks on public property. *Id.* at 412-14.

83. *Id.* at 414.

84. See *id.* at 454. "The city has asserted an interest in esthetics, but respondent publishers' newsracks are no greater an eyesore than the newsracks permitted to remain on Cincinnati's sidewalks." *Id.*

85. 507 U.S. 761 (1993).

86. *Id.* at 763.

87. *Id.* at 770 (quoting *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 71, n.20 (1983)).

the harms it recites are real and that its restriction will in fact alleviate them to a material degree."⁸⁸ Specifically, the Court noted that although the Board of Accountancy's interests were substantial,⁸⁹ the Board failed to substantiate that the prohibition on solicitation furthered its interests.⁹⁰

The Supreme Court appeared to be moving away from the *Posadas* rational basis interpretation. However, two months after *Fane*, the Court decided *United States v. Edge Broadcasting Co.*⁹¹ In *Edge*, the Court deferred to congressional judgment by upholding a federal statute prohibiting lottery advertisements in non-lottery states.⁹² In assessing *Edge* under the "proper fit" prong of the *Central Hudson* test, the Court stated that with commercial speech, the Court would "allow room for legislative judgments."⁹³ The Court stated, "Congress clearly was entitled to determine that broadcast of promotional advertising of lotteries undermines North Carolina's policy against gambling, even if the North Carolina's audience is not wholly unaware of the lottery's existence."⁹⁴

Although *Edge* appeared to fall out of line regarding the appropriate degree of deference under *Central Hudson*, in 1995, the Court, in *Rubin v. Coors Brewing Co.*,⁹⁵ reinforced its previous holding in *Fane*, which required that the government assert its interest "in a direct and material way."⁹⁶ The Court in *Rubin* struck down a portion of the Federal Alcohol Administration Act that prohibited beer labels from indicating alcohol content.⁹⁷ The Court found the government's interest in suppressing the possibility of "strength wars"⁹⁸ unavailing in light of the government's differing policy with regard to labels and advertising and contrary policy with regard to wine and spirits.⁹⁹

88. *Id.* at 770-71.

89. *Id.* at 767. The Board of Accountancy identified that the ban on solicitation advanced the state's interests in preventing fraud, maintaining the fact and appearance of CPA independence, and protecting a client's privacy. *Id.* at 768.

90. The Court added that the Board of Accountancy presented nothing more than conclusory statements—no studies or anecdotal evidence—to demonstrate that the ban on CPA solicitation advanced the Board's interests in any direct or material way. *Id.* at 771-72.

91. 509 U.S. 418 (1993).

92. *Id.* at 434, 436. *Edge* operated a radio station licensed by the FCC in North Carolina, a non-lottery state. *Id.* at 423. However, ninety-two percent of *Edge*'s listening audience and ninety-five percent of *Edge*'s advertising revenue were generated from neighboring Virginia. *Id.* at 423-24. As a result, *Edge* desired to advertise Virginia's state lottery. *Id.* at 424. Because 18 U.S.C. § 1304 prohibited *Edge* from airing lottery advertisements from a non-lottery state, *Edge* sought declaratory judgment and injunctive relief. *Id.*

93. *Id.* at 434 (citing *Bd. of Tr. of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989)).

94. *Id.*

95. 514 U.S. 476 (1995).

96. *Id.* at 487 (quoting *Edenfield v. Fane*, 507 U.S. 761, 767 (1993)).

97. *Id.* at 488.

98. The government asserted that without regulation, brewers would engage in competitive practices in the marketplace by allowing beer labels to include their respective potencies. *Id.* at 479.

99. *Id.* at 487-88. Although the Court did not find the government's interests without merit, the Court added that "[t]here is little chance that . . . [the prohibition] can directly and materially advance its aim, while other provisions of the same Act directly undermine and counteract its effects." *Id.* at 489.

D. 44 *Liquormart, Inc. v. Rhode Island*:¹⁰⁰ A Reconciliation?

In 1996, the Court in 44 *Liquormart* issued a fragmented and complicated opinion, but seemed to settle the inconsistency that preceded it by elevating *Central Hudson* into more of a restrictive test.¹⁰¹ 44 *Liquormart* involved a challenge by liquor retailers of a Rhode Island law that prohibited advertisements of liquor prices.¹⁰² After the Court determined that the *Central Hudson* analysis applied to the 44 *Liquormart* controversy,¹⁰³ the Court proceeded to the pivotal and much debated third and fourth prongs and determined that the State's restriction was unconstitutional for failing to establish a "reasonable fit."¹⁰⁴ Specifically, the Court iterated that *Central Hudson's* third prong required that a state's regulation "significantly" advance its substantial interest, rather than simply further it.¹⁰⁵ Furthermore, the Court added that mere speculation or conjecture would not suffice to meet this requirement.¹⁰⁶ The Court added that the fourth prong of *Central Hudson* required that the restriction not be more extensive than necessary to achieve the state's objective.¹⁰⁷

More importantly, the Court also used 44 *Liquormart* decision to defend and dismiss the highly deferential language utilized in both the *Edge*¹⁰⁸ and *Posadas* decisions, respectively.¹⁰⁹ In particular, the Court maintained that the *Posadas*

100. 517 U.S. 484 (1996).

101. See generally 44 *Liquormart*, 517 U.S. 484 (1995).

102. *Id.* at 491-93.

103. It is important to note that the following discussion of 44 *Liquormart* refers to the plurality opinion of the Court, because a majority of the Justices could not agree on a uniform rationale. *Id.* at 488-89.

104. See *id.* at 504-08. The Court briefly maintained that the speech at issue was truthful, non-misleading, and lawful, and summarily asserted that the state's interest in promoting temperance was indeed substantial. See *id.* at 504.

105. *Id.* at 505; see *Edenfield v. Fane*, 507 U.S. 761, 771 (1993); see *supra* notes 87-90 and accompanying text. Specifically, the Court stated that although the prohibition on price advertising may have some effect on quelling the consumption of alcohol, the lack of findings of fact and evidentiary support added little to suggest that the prohibition would "significantly" reduce alcohol consumption. 44 *Liquormart*, 517 U.S. at 505-06.

106. 44 *Liquormart*, 517 U.S. at 507. "Such speculation certainly does not suffice when the State takes aim at accurate commercial information for paternalistic ends." *Id.* See *Fane*, 507 U.S. at 770; see also *supra* notes 87-88 and accompanying text.

107. 44 *Liquormart*, 517 U.S. at 507. "It is perfectly obvious that alternative forms of regulation that would not involve any restriction on speech would be more likely to achieve the State's goal of promoting temperance." *Id.*

108. The Court distinguished *Edge* by indicating that *Edge* referred to a regulation concerning illegal conduct (lottery advertising broadcasted from a non-lottery state), while 44 *Liquormart* referred to a speech regulation concerning lawful behavior (price advertising). *Id.* at 508-09.

109. *Id.* at 508-14.

Court clearly erred in deferring to "legislative judgment."¹¹⁰ The Supreme Court also took the opportunity to dismiss the "greater-includes-the-less" reasoning in *Posadas*, which allowed the argument that because a state could constitutionally ban the sale of liquor outright, the state could take the less intrusive step of simply banning liquor advertising.¹¹¹ Finally, the 44 *Liquormart* Court refuted the assumption inferred from *Posadas* and *Edge*—that the Supreme Court was willing to accord more deference with regard to regulating "vices."¹¹²

Although 44 *Liquormart* appeared to reconcile cases awaiting its decision, in application, it did nothing more than contribute to more uncertainty as to the restrictiveness of the *Central Hudson* test. In particular, what awaited the commercial speech doctrine was a split among the circuits regarding the constitutionality of section 316 of the Communications Act of 1934 (codified as 18 U.S.C. section 1304) which, inter alia, prohibits the broadcasting of casino gambling advertisements on radio and television.¹¹³

E. The History of Congress' Regulation of Gaming

Early on, Congress discouraged the operation of lotteries and prohibited the dissemination of information about lotteries by the federal postal system¹¹⁴ and newspapers,¹¹⁵ even when the lottery itself was supported by a state.¹¹⁶ As radio and television became more pervasive, Congress passed the Communications Act of 1934,¹¹⁷ which prohibited any licensed radio or television station from broadcasting lottery advertisements.¹¹⁸ In 1950, Congress began to narrow the applicability of section 1304 by excluding non-profit fishing contests from the

110. *Id.* at 509.

Posadas clearly erred in concluding that it was 'up to the legislature' to choose suppression over a less-speech-restrictive policy. The *Posadas* majority's conclusion on that point cannot be reconciled with the unbroken line of prior cases striking down similarly broad regulations on truthful, non-misleading advertising when non-speech related alternatives were available.

Id. at 509-10.

111. *Id.* at 510-11 (rejecting a similar argument made in *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 482-83, n.2). "The text of the First Amendment makes clear that the Constitution presumes that attempts to regulate speech are more dangerous than attempts to regulate conduct." *Id.* at 512.

112. *Id.* at 514. The Court maintained that if such an exception existed "[a]most any product that poses some threat to public health or public morals might reasonably be characterized by a state legislature as relating to 'vice activity.'" *Id.*

113. See 18 U.S.C. § 1304 (1994).

114. *Ex parte Rapier*, 143 U.S. 110, 134 (1892) (stating that the demoralizing effect of lotteries justified excluding such advertisements from the federal postal mails).

115. *Id.* (outlawing newspaper's advertisements of lotteries and prize lists).

116. See 18 U.S.C. §§ 1301-03 for anti-lottery statutes.

117. 48 Stat. 1088, § 316 (1934) (codified at 18 U.S.C. § 1304).

118. 18 U.S.C. § 1304. Specifically, the Act prohibited the following:

[A]ny advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes.

Id.

broadcasting restriction because such contests were considered innocent pastimes.¹¹⁹ In 1975, Congress responded to the popularity of state-run lotteries by exempting them from both the nationwide postal restrictions and the radio and television restrictions when such advertisements are "broadcast by a radio or television station licensed to a location in . . . a State which conducts such a lottery."¹²⁰

In 1988, Congress excised another significant exemption by passing the Indian Gaming Regulatory Act (IGRA),¹²¹ which authorized tribal gambling in any state where it was permitted.¹²² IGRA also exempted tribes from the postal and transportation restriction.¹²³ More importantly, it exempted tribes from the radio and television geographic restrictions.¹²⁴ Also in 1988, Congress passed the Charity Games Advertising Clarification Act,¹²⁵ which extended the reach of state-run lottery exemptions to include other lotteries or schemes not prohibited by state law and conducted by: (1) a governmental entity; (2) a not-for-profit entity; or (3) a commercial entity as a promotional activity, if such activity is ancillary to the organization.¹²⁶

In 1992, Congress acted again by passing the Professional Amateur Sports Prohibition Act,¹²⁷ which prohibited most sports-betting and advertising, but included a variety of convoluted restrictions that did not apply to broadcasters, regardless of geographic location.¹²⁸

F. Circuit Courts Disagree Over the Constitutionality of Prohibiting Private Lawful Casinos from Advertising

The Ninth Circuit Court of Appeals in *Valley Broadcasting Co. v. United States*¹²⁹ invalidated a portion of 18 U.S.C. section 1304 because the statute's numerous exceptions undermined the federal government's interest in materially advancing its goal to "reduce public participation in all commercial lotteries,"

119. S. Rep. No. 81-2243, at 2 (1950).

120. 18 U.S.C. § 1307(a)(1)(B). Look to *United States v. Edge Broad. Co.*, 509 U.S. 418, 428 (1993), for the Supreme Court's clarification of the geographic restriction for broadcasting of radio and television. See also *supra* notes 91-94 and accompanying text.

121. 25 U.S.C. § 2701 (1994).

122. *Id.* at § 2710(d)(1)(B).

123. *Id.* at § 2720.

124. *Id.*

125. 18 U.S.C. § 1307(a)(2) (1998).

126. *Id.* The § 1307 exemption also applies to state and locally conducted lotteries, and contains no geographically limiting language, thus exempting them from the geographic restrictions in § 1304, as clarified in *United States v. Edge Broad. Co.*, 509 U.S. 418, 428 (1993).

127. 28 U.S.C. § 3701-04 (1994).

128. *Id.* at § 3702.

129. 107 F.3d 1328 (9th Cir. 1997).

therefore failing to satisfy *Central Hudson*.¹³⁰ The Ninth Circuit found the federal government's interests in reducing public participation in commercial lotteries and protecting those states that choose not to permit lotteries, although legitimate, were insufficient to meet constitutional scrutiny in light of the government's overall policy on gaming.¹³¹ The District Court of New Jersey in *Players International, Inc. v. United States*¹³² held the same portion of the statute unconstitutional for similar reasons.¹³³

The Fifth Circuit in *Greater New Orleans Broadcasting Ass'n, Inc. v. United States*,¹³⁴ on the other hand, held the identical portion of the Act constitutional, relying upon the *Posadas* decision.¹³⁵ However, on remand, in light of the Supreme Court's decision in *44 Liquormart*, the Fifth Circuit declined to adjust its decision and analysis under the third prong of *Central Hudson*.¹³⁶ The court maintained that *44 Liquormart* did not alter the third prong but simply required greater scrutiny under the fourth prong of the *Central Hudson* test.¹³⁷

G. The Possibilities Amidst the Confusion

Although the Court could revert back to its previous deferential stance and allow Congress more leeway in advancing its substantial interests, the Court will likely decline to lessen the scrutiny of the *Central Hudson* test in light of the Court's plurality opinion in *44 Liquormart*.¹³⁸ *44 Liquormart* diminishes the likelihood that the Court will revert back to the paternalistic language found in *Posadas* and *Edge* and institute a rational basis type of test.¹³⁹ On the other hand, the Court, noting that four Justices of the Court agree that commercial speech deserves full protection when it is truthful and concerns a lawful activity, could abolish the test in its entirety and confer upon commercial speech full First Amendment protection.¹⁴⁰ However, it is conceivable that the Court will find a position between both extremes and clarify the *Central Hudson* test in light of *44 Liquormart*.¹⁴¹

130. *Id.* at 1335-36.

131. *Id.* at 1334-36. The Ninth Circuit acknowledged that although *44 Liquormart* was a fragmented plurality opinion, the ruling made the federal government's claim less likely to succeed. *Id.* at 1334.

132. 988 F. Supp. 497 (D.N.J. 1997).

133. *Id.* at 506-07.

134. 69 F.3d 1296 (5th Cir. 1995), *vacated by*, 519 U.S. 801 (1996) (mem.), *aff'd*, 149 F.3d 334 (5th Cir. 1998), *rev'd*, 527 U.S. 173 (1999).

135. *Id.* at 1300-02.

136. *Greater New Orleans*, 149 F.3d at 336-37.

137. *Id.*

138. *See Ritter, supra* note 70, at 1519-20.

139. *See id.*

140. *See* John J. Walsh et al., Commentary, *Supreme Court Should Strengthen Commercial Speech Rights*, 4 No. 1 ANDREWS GAMING INDUS. LITIG. REP. 11 (May 1999) (citing *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 501, 526 (1996) (Thomas, J. concurring)).

141. *See supra* notes 101-112 and accompanying text.

III. FACTS OF THE CASE

Petitioners were an association of Federal Communications Commission ("FCC") licensed radio and television broadcasters who operated in the New Orleans metropolitan area of Louisiana.¹⁴² Petitioners desired to broadcast promotional advertisements for privately operated, for-profit casinos in the state of Louisiana, where gambling is legal.¹⁴³ However, due to 18 U.S.C. § 1304 and an FCC companion regulation,¹⁴⁴ such commercial advertisements were prohibited regardless of a station or casino's location.¹⁴⁵ As a result, the petitioners brought a declaratory action challenging the application of section 1304 and the FCC companion regulation and asked for injunctive relief, on the basis that the statute and regulation violated the First Amendment as applied to the petitioners.¹⁴⁶

Petitioners subsequently initiated an action in the Eastern District Court of Louisiana.¹⁴⁷ The District Court employed the commercial speech standard laid down in *Central Hudson* and ruled in favor of the federal government.¹⁴⁸ The court determined that the government's commercial speech restrictions were appropriate given its substantial interests in quelling the demand for gambling and its ancillary social costs, as well as protecting states that prohibit gambling as a general policy.¹⁴⁹ On appeal, the Fifth Circuit affirmed the opinion of the district court on similar grounds in a divided opinion.¹⁵⁰ While contemplating the petitioner's writ of certiorari, the Court decided *44 Liquormart, Inc. v. Rhode Island*,¹⁵¹ in which the Court determined that many courts had too strictly applied the standard under *Central Hudson*.¹⁵² As a result, the Court granted the broadcasters' petition, vacated the decision of the Fifth Circuit, and remanded the case in light of the Court's clarification of the *Central Hudson* standard in *44 Liquormart*.¹⁵³ The Fifth Circuit, on remand, while noting the stricter standard under *44 Liquormart*, adhered to its prior determination.¹⁵⁴ However, soon after

142. *Greater New Orleans*, 527 U.S. at 180.

143. *Id.*

144. 18 U.S.C. § 1304 (1994); 47 C.F.R. § 73.1211 (1998).

145. *Greater New Orleans*, 527 U.S. at 180-81.

146. *Id.* at 181.

147. *Id.* Both parties agreed the case be summarily decided on their cross motions. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. 517 U.S. 484 (1996).

152. *Greater New Orleans*, 527 U.S. at 182 (citing *44 Liquormart*, 517 U.S. at 509-10).

153. *Id.*

154. *Id.* at 182-83.

the Fifth Circuit's decision, the Ninth Circuit Court of Appeals¹⁵⁵ and the New Jersey District Court¹⁵⁶ reached contrary decisions regarding the application of 44 *Liquormart*.¹⁵⁷

Consequently, the Supreme Court granted certiorari in 1999 to determine whether the First Amendment permits the federal government to regulate lawful casino gambling by prohibiting non-misleading and truthful advertising about such conduct.¹⁵⁸

IV. ANALYSIS OF THE COURT'S OPINIONS

A. *Majority Opinion*

Delivering the opinion of the Court, Justice Stevens¹⁵⁹ began his analysis by giving a brief synopsis of the history of Congress' position in regulating gaming enterprises, including the dissemination of information regarding such enterprises.¹⁶⁰ Justice Stevens maintained that from the nineteenth century to midway through the twentieth century, Congress adhered to a strict policy of discouraging lotteries and the dissemination of material advancing such activities.¹⁶¹ Moreover, the Supreme Court supported federal postal system prohibitions of information on the subject based on "the notion that 'lotteries . . . are supposed to have a demoralizing effect on people.'"¹⁶² Moreover, as broadcasting and communications technology evolved and became profitable, Congress enacted the Communications Act of 1934, which extended the prohibition of such demoralizing information to dissemination via radio and television.¹⁶³

However, Justice Stevens mentioned that, in both 1950 and 1975, Congress narrowed the applicability of their stance on gaming by excluding activities such as non-profit fishing contests and state-run lotteries from the postal restrictions and broadcast ban.¹⁶⁴ Furthermore, Justice Stevens asserted that in 1988, through the Indian Gaming Regulatory Act (IGRA), Congress extended exemptions to allow Indian tribes to conduct gaming activities, in addition to exempting them from postal, transportation, and geographic broadcasting restrictions.¹⁶⁵

155. *Valley Broad. Co. v. United States*, 107 F.3d 1328 (9th Cir. 1997).

156. *Players Int'l, Inc. v. United States*, 988 F. Supp. 497 (D.N.J. 1997).

157. *Greater New Orleans*, 527 U.S. at 183.

158. *Id.*

159. Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy, Souter, Ginsburg, and Breyer joined in the opinion.

160. *Greater New Orleans*, 527 U.S. at 176-81.

161. *Id.* at 176; *supra* notes 114-18 and accompanying text.

162. *Greater New Orleans*, 527 U.S. at 176 (citing *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942)); *supra* notes 114-16 and accompanying text.

163. *Greater New Orleans*, 527 U.S. at 177; *supra* note 118 and accompanying text.

164. *Greater New Orleans*, 527 U.S. at 178; *supra* notes 119-20 and accompanying text.

165. *Greater New Orleans*, 527 U.S. at 178-79; *supra* notes 121-24 and accompanying text.

Finally, Justice Stevens pointed out that, in 1988, Congress extended the 1950 state-run lottery exemptions through the Charity Advertising Clarification Act ("CACA").¹⁶⁶ More importantly, unlike the state lottery exemptions granted in 1975, the CACA lifted the geographic restriction on broadcasting as applied to casinos run by state and local governments.¹⁶⁷ Moreover, in 1992 Congress passed the Professional Amateur Sports Prohibition Act, which not only proscribed sports betting and advertising but also included a variety of exceptions that did not apply to broadcasters, regardless of geographic location.¹⁶⁸

After remarking on the differences between Congress' policy on gaming from the beginning in 1934 to the present, Justice Stevens introduced the substantive portion of the opinion by providing the four pronged analysis—as laid down in *Central Hudson*—that is used to assess commercial speech:

At the outset, the court must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, a court must ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, the court must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.¹⁶⁹

Before introducing the Court's analysis under *Central Hudson*, Justice Stevens acknowledged and dismissed the temptation to utilize the current controversy to espouse broad constitutional pronouncements when the case at bar could be fully decided on a much narrower basis—utilization of the *Central Hudson* test.¹⁷⁰ Addressing the first prong of *Central Hudson*, Justice Stevens acknowledged that both parties agreed that the variety of advertisements that the petitioners attempted to broadcast were commercial in nature, not misleading, and concerned a lawful activity, thereby satisfying the first prong under *Central*

166. *Greater New Orleans*, 527 U.S. at 179; *supra* notes 125-27 and accompanying text.

167. *Id.*

168. *Greater New Orleans*, 527 U.S. at 179-80; *see supra* notes 127-28 and accompanying text.

169. *Greater New Orleans*, 527 U.S. at 183. (quoting *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980)). Justice Stevens clarified that it is the government's burden to determine a substantial interest and justify the challenged prohibition. *Id.* Moreover, he asserted that the four prongs under the *Central Hudson* test are not entirely independent of one another, but are rather interrelated—"each raises a relevant question that may not be dispositive to the First Amendment inquiry, but the answer to which may inform a judgment concerning the other three." *Id.* at 184.

170. *Id.*

Hudson.¹⁷¹

Under the second prong, Justice Stevens examined the federal government's two "substantial interests" in restricting the broadcasters' attempted commercial speech.¹⁷² The government argued that the restrictions satisfied two federal interests: (1) reducing the social costs affiliated with gambling, and (2) aiding states that prohibit casino gambling in effectuating their anti-gambling policy.¹⁷³ Although Justice Stevens recognized the interests of both the federal and state governments in abating the social ills associated with gambling, Justice Stevens pointed out that "[d]espite its awareness of the potential social costs, Congress has not only sanctioned casino gambling for Indian tribes through tribal-state compacts, but has enacted other statutes that reflect approval of state legislation that authorizes a host of public and private gambling activities."¹⁷⁴ Justice Stevens further recognized that although "enacted congressional policy and 'governmental interests' are not necessarily equivalents for purposes of commercial speech analysis," the federal government's unwillingness to adopt a policy that endorsed either governmental interest severely weakened the government's position.¹⁷⁵

Before addressing the substantive analysis under prongs three and four as derived from *Central Hudson*, Justice Stevens clarified and specified the government's burden under each prong.¹⁷⁶ Under the third prong, Justice Stevens maintained that the government must prove that the speech restriction materially advances its "substantial interests."¹⁷⁷ Justice Stevens stated that the government's burden is not achieved by mere speculative assertions, but rather it is achieved by showing "that the harms it recites are real and that its restrictions will in fact alleviate them to a material degree."¹⁷⁸ Under the fourth prong—a direct extension of the third—Justice Stevens asserted that the government must then show that the restriction is no more extensive than necessary to satisfy the federal government's substantial interests.¹⁷⁹ However, Justice Stevens maintained that this connection does not dictate that the government employ a policy that is the "least restrictive means conceivable," but rather a policy that is reasonable and in proportion with

171. *Id.* "[P]etitioners' broadcasts presumably would disseminate accurate information as to the operation of market competitors, such as pay-out ratios, which can benefit listeners by informing their consumption choices and fostering price competition." *Id.* at 184-85.

172. *Id.* at 185.

173. *Id.* The government suggested that "gambling contributes to corruption and organized crime; underwrites bribery, narcotics trafficking, and other illegal conduct; imposes a regressive tax on the poor; and 'offers a false but sometimes irresistible hope of financial advancement.'" *Id.* (quoting Brief for Respondents 15-16).

174. *Id.* at 186-87 Justice Stevens remarked that "[w]hatever its character in 1934 when § 1304 was adopted, the federal policy of discouraging gambling in general, and casino gambling in particular is now decidedly equivocal." *Id.* at 187.

175. *Id.*

176. *Id.* at 188.

177. *Id.*

178. *Id.* (quoting *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993)).

179. *Id.*

the government's interest.¹⁸⁰

As to the government's first substantial interest, the federal government alleged that allowing private, for-profit casino advertising would increase its demand, thus increasing the social costs stemming from the activity.¹⁸¹ Justice Stevens asserted that although it is reasonable to assume that advertising would cause the demand for casinos to increase, it is also reasonable to assume that such advertisements would cause gamblers to choose one casino over the other.¹⁸²

Moreover, in light of the inconsistencies and exemptions originating from the statute,¹⁸³ coupled with a FCC policy that contradicts the government's asserted interest in lessening the "costs" of gambling,¹⁸⁴ Justice Stevens asserted that

the Government is committed to prohibiting accurate product information, not commercial enticements of all kinds, and then only when conveyed over certain forms of media and for certain types of gambling—indeed, for only certain brands of *casino* gambling—and despite the fact that messages about the availability of such gambling are being conveyed over the airwaves by other speakers.¹⁸⁵

Furthermore, Justice Stevens found unpersuasive the government's practice of "pegging" the speech of casinos based on the casino owners.¹⁸⁶ He pointed out that the only significant distinguishing characteristic between tribal casinos and non-tribal casinos is the fact that tribal casinos are heavily regulated.¹⁸⁷ Justice Stevens alleged that if this factor contributed to mitigating the social ills of gambling, one would think that Congress would have adopted a similar policy with regard to unregulated casinos before abridging the speech rights of private

180. *Id.*

181. *Id.* Moreover, the government alleged that compulsive gamblers are especially prone to the "pervasiveness and potency" of gambling advertisements. *Id.*

182. *Id.* "More important, any measure of the effectiveness of the Government's attempt to minimize the social costs of gambling cannot ignore Congress' simultaneous encouragement of tribal casino gambling, which may well be growing at a rate exceeding any increase in gambling or compulsive gambling that private casino advertising could produce." *Id.*

183. Under current law, a private casino may not advertise, regardless of the casino's location, whereas tribal casinos and other enterprises sanctioned by statute, may advertise anywhere, regardless of a state's general anti-gambling policy. *Id.* at 190.

184. "[T]he FCC has permitted broadcasters to tempt viewers with claims of 'Vegas-style excitement' at a commercial 'casino,' if 'casino' is part of the establishment's proper name and the advertisement can be taken to refer to the casino's amenities, rather than directly promote its gaming aspects." *Id.* at 190-91. Although the FCC attempts to save certain speech through its interpretation, its general effect runs counter to the governmental proffered interests. *Id.* at 191.

185. *Id.*

186. *Id.* The government cites the general welfare needs of tribes, however, acknowledges no differences between the services offered at for profit casinos and tribal casinos. *Id.*

187. *Id.*

casinos.¹⁸⁸ He acknowledged that while a lack of direct regulation of casino gambling by Congress does not summarily compromise the constitutionality of the restriction, the regulation does nothing to bolster the government's justification.¹⁸⁹

Viewing the prohibition of the petitioner's attempted speech in the context of Congress' overall regulatory position, Justice Stevens asserted that the prohibition of the petitioner's attempted conduct would not directly advance the government's substantial interest.¹⁹⁰ Moreover, the idea that Congress has less intrusive policies available to effectuate its interests weakens the government's position.¹⁹¹

Justice Stevens agreed that although some justification existed for treating non-Indian businesses differently than tribal enterprises, it did not directly follow that this should dictate differing treatment of their First Amendment rights.¹⁹² Justice Stevens reasoned that "the power to prohibit or to regulate a particular conduct does not necessarily include the power to prohibit or regulate speech about that conduct."¹⁹³ Justice Stevens concluded his analysis of the government's first proffered substantial interest by stating that "[e]ven under the degree of scrutiny that we have applied in commercial speech cases, decisions that select among speakers conveying virtually identical messages are in serious tension with the principles undergirding the First Amendment."¹⁹⁴

In addressing the federal government's second interest in protecting states that outlaw private casino gambling, Justice Stevens summarily stated that "[w]e cannot see how this broadcast restraint, ambivalent as it is, might directly and adequately further any *state* interest in dampening consumer demand for casino gambling if it cannot achieve the same goal with respect to the similar *federal* interest."¹⁹⁵ Furthermore, Justice Stevens elaborated that even if a state interest is more pressing than the federal government's interest, the statute at bar "sacrifices an intolerable amount of truthful speech about lawful conduct when compared to all of the policies at stake and the social ills that one could

188. *Id.*

189. *Id.* at 192.

There surely are practical and non-speech-related forms of regulation—including a prohibition or supervision of gambling on credit; limitations on the use of cash machines on casino premises; controls on admissions; pot or betting limits; location restrictions; and licensing requirements—that could more directly and effectively alleviate some of the social costs of casino gambling.

Id.

190. *Id.*

191. *Id.*

192. *Id.* at 193.

193. *Id.* "It is well settled that the First Amendment mandates closer scrutiny of government restrictions on speech than of its regulation of commerce alone." *Id.* (citing *Bd. of Trs. of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989)).

194. *Id.* at 193-94.

195. *Id.* at 194.

reasonably hope such a ban to eliminate."¹⁹⁶

Justice Stevens concluded that the government failed to meet its burden under *Central Hudson*, thus leaving the audience to assess the value of the non-misleading, accurate information concerning lawful conduct.¹⁹⁷ Additionally, Justice Stevens left open the possibility that if the government adopted a coherent policy, or accommodated the right of those broadcasters where such conduct is legal, the case may have turned out differently.¹⁹⁸

B. Justice Rehnquist's Concurring Opinion

Chief Justice Rehnquist delivered a concurring opinion.¹⁹⁹ The Chief Justice suggested that if Congress were to establish a substantive regulation of the gambling industry not so riddled with exceptions, then section 1304 would pass constitutional muster.²⁰⁰

C. Justice Thomas's Concurring Opinion

Justice Thomas delivered a concurring opinion in which he concurred only with the judgment.²⁰¹ In his opinion, Justice Thomas relied on his concurrence in *44 Liquormart*, in which he stated that where a "government's interest is to keep legal users of a product or service ignorant in order to manipulate their choices in the marketplace," the *Central Hudson* analysis is per se illegitimate.²⁰²

V. IMPACT

A. Judicial Impact

The Supreme Court resolved the confusion between the Ninth and Second Circuits.²⁰³ The level of proof required under the *Central Hudson* test is now solidified as a more restrictive test. The Court strengthened the third prong of the *Central Hudson* test by maintaining that the interests in abridging commercial speech must be "real" and must "materially advance" the government's substantial

196. *Id.*

197. *Id.* (citing *Edenfield v. Fane*, 507 U.S. 761, 767 (1993)).

198. *Id.* at 195.

199. *Id.* at 196-97 (Rehnquist, C.J., concurring).

200. *Id.*

201. *Id.* at 197. (Thomas, J., concurring in the judgment).

202. *Id.*; *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 518 (1996) (Thomas, J., concurring in Parts I, II, VI, and VII, and concurring in the judgment).

203. *See generally* *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173 (1999).

interests.²⁰⁴ The Court also strengthened the fourth prong of the *Central Hudson* test by requiring that the speech abridgment be no more extensive than necessary to satisfy the proffered substantial interests.²⁰⁵ In particular, the fourth prong requires that the consistency of a government regulatory interest be considered as a whole to determine if the government could advance its interest through a less intrusive non-speech alternative.²⁰⁶

The Court, however, never squarely addressed the geographic limitations of private, lawful casino advertising.²⁰⁷ Although it is clear that private, lawful casinos can broadcast from states where such conduct is legal,²⁰⁸ the question remains whether gaming enterprises' advertisements can be broadcast anywhere, regardless of the particular policy of the state where such information originates. The problem with the pre-*Greater New Orleans* congressional inconsistencies regarding casino advertising as a whole appear to be continuing in this issue of geographic limitations.²⁰⁹ On one hand, tribal casinos can advertise anywhere, including states where such conduct is legal.²¹⁰ The same applies to state or locally conducted casinos²¹¹ and those other activities that come under the Charity Games Advertising Clarification Act²¹² and the 1992 Professional and Amateur Sports Protection Act.²¹³ Thus, Congress permits nationwide gaming advertisements, regardless of where such advertisements originate, for some entities but not for private lawful casinos. Although the Court only applied the *Greater New Orleans* restrictions in that specific situation, the question remains whether it should matter where an advertisement originates. Interestingly, the Department of Justice and the FCC have recently solved the dilemma for the time being, agreeing not to enforce the geographic restrictions.²¹⁴ *United States v. Edge*, on the other hand, which was repeatedly cited in *Greater New Orleans*, disallowed the broadcast advertising of lotteries that originated from a state where such conduct was illegal, but permitted broadcast advertising of lotteries that originated

204. *Id.* at 188; *see also supra* notes 177-78 and accompanying text.

205. *Greater New Orleans*, 527 U.S. at 188; *see supra* notes 179-80 and accompanying text.

206. *See Greater New Orleans*, 527 U.S. at 192-93; *see also supra* notes 187-90 and accompanying text.

207. *Greater New Orleans*, 527 U.S. 192-93; *see also supra* notes 202-03 and accompanying text.

208. *See Greater New Orleans*, 527 U.S. at 193-95; *see also supra* notes 197-98 and accompanying text.

209. *See infra* notes 208-213 and accompanying text.

210. 25 U.S.C. § 2701 (Supp. 2000); *see also supra* notes 121-24 and accompanying text.

211. 18 U.S.C. § 1307 (a)(2)(2000); *see also supra* notes 125-26 and accompanying text.

212. 18 U.S.C. § 1307 (a)(2) (2000).

213. 28 U.S.C. § 3701-02 (1994); *see also supra* notes 127-28 and accompanying text.

214. In light of the *Greater New Orleans* decision,

[t]he Department of Justice and the FCC subsequently filed a brief in a case before the Third Circuit (*Players International v. United States* [citation omitted]) indicating that they will no longer seek to enforce federal laws banning casino gambling advertisements, whether the broadcaster who transmits the ad is located in a state that permits or prohibits casino gambling.

Jeffrey S. Edelstein, *Recent Developments in Advertising Law*, 1148 PRACTICING L. INST. 7, 14 (1999), available in Westlaw at 1148 PLL/Corp 7. Because the Supreme Court's ruling in *Greater New Orleans* involved a federal statute, a similar question may remain regarding a similarly situated state law. *Id.* at 15.

from a state where such conduct was legal.²¹⁵ *Greater New Orleans* appears to challenge *Edge's* validity, even though the Court never squarely called *Edge* into question. Noting that lotteries and casinos are both gaming activities, it becomes difficult to reconcile *Edge* and lottery advertisements with the congressional inconsistency in the realm of casino gaming broadcast restrictions.

In *Greater New Orleans*, the Court opted not to raise the *Central Hudson* test to the compelling state interest scrutiny utilized in assessing content-based abridgments. However, in application, all commercial speech concerning a truthful and lawful activity will successfully demand such First Amendment protection.²¹⁶ Justice Thomas' foresight in *44 Liquormart*, and the same rationale to which he tersely allude in *Greater New Orleans*, may serve as the beacon for the abolition of the commercial speech doctrine as case after case is struck down for attempting to regulate lawful and truthful commercial speech without initially regulating the underlying conduct.

[T]he Court's holding [referring to *44 Liquormart*] will in fact be quite sweeping if applied consistently in future cases. The opinions would appear to commit the courts to striking down restrictions on speech whenever a direct regulation . . . would be an equally effective method of dampening demand by legal users. But it would seem that directly banning a product (or rationing it, taxing it, controlling its price, or otherwise restricting its sale in specific ways) would virtually always be at least as effective in discouraging consumption as merely restricting advertising regarding the product would be, and thus virtually all restrictions with such a purpose would fail the fourth prong of the *Central Hudson* test.²¹⁷

Time will ultimately tell whether Justice Thomas' rationale regarding the application of the commercial speech doctrine will eventually come to fruition and serve as the crux for a future majority opinion. However, that time may be forthcoming as tobacco advertisement curtailments are likely challenged and litigated.²¹⁸ The tobacco controversy may serve as a litmus test for Justice Thomas' pragmatic prophecy.

215. *United States v. Edge Broad. Co.*, 509 U.S. 418, 434-35.

216. See O'Neill, *supra* note 7, at 293-94 (citing *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 519 (1996)).

217. *44 Liquormart*, 517 U.S. at 524 (Thomas, J., concurring in Parts I, II, VI, and VII, and concurring in judgment).

218. See *infra* notes 223-31 and accompanying text.

B. Legislative Impact

The *Greater New Orleans* decision sends the message to Congress that any future attempts at regulating the speech of any "vice" activity²¹⁹ (e.g., alcohol, gambling, tobacco, and possibly marijuana) is non-availing.²²⁰ Moreover, *Greater New Orleans* signals to Congress that it may enter the market only after Congress first attempts to advance its "substantial interest" through non-speech alternatives. As a result, Congress is faced with the daunting task of attempting to censor truthful advertisements that may aid consumers in comparing prices or introducing them to lawful services.²²¹ In particular, the Court suggested that if Congress wishes to restrict the gambling advertisements of private casinos, Congress must develop a concerted underlying policy to justify the existence of such a regulation.²²² Thus, the Court has not wholeheartedly dismissed Congress' role in commercial speech regulation, but rather, it has made it more difficult for Congress to influence consumer choice by limiting what consumers see and hear.

Many critics tout the *Greater New Orleans* decision as means to resurrect tobacco advertising.²²³ Before *Greater New Orleans*, many proponents of banning tobacco advertising claimed that because tobacco was considered a "vice," tobacco advertisements received less First Amendment protection than other products or services.²²⁴ However, cigarettes are a lawful product and consumers could arguably benefit from knowing the nicotine and tar content when making a purchase.²²⁵ What stands in the way of tobacco companies lining up at the courthouse steps with *Greater New Orleans* in their back pocket is the settlement agreements that tobacco companies recently reached with several state attorneys general.²²⁶ Under the settlement agreements, tobacco companies "voluntarily" assented to many advertising restrictions and agreed to waive their First Amendment rights in exchange for limited liability benefits.²²⁷ Although the

219. If there was any doubt after 44 *Liquormart* that "vices" received any special treatment, see *supra* note 109 and accompanying text, *Greater New Orleans* belies the proposition that a "vice" is a self-determinative term in First Amendment jurisprudence.

220. Doug Halonen, *Will Casino Ads Lead to Liquor?*, ELECTRONIC MEDIA, June 21, 1999, at 3, available at 1999 WL 8766563; Jan Crawford Greenburg, *Top Court Rescinds Ad Bans on Private Casinos*, CHI. TRIB., June 15, 1999, at 4, available at 1999 WL 2883446.

221. See Warren Richey, *Court puts gambling back on the airwaves; Supreme Court finds too many flaws in law, allows casino ads on TV*, CHRISTIAN SCIENCE MONITOR, June 15, 1999, at 3, available at 1999 WL 5380065.

222. *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 193-96 (1999); Daniel E. Troy, *Banning Ads Just Got Harder*, WALL ST. J., June 21, 1999, at A27 [hereinafter "Troy, *Banning Ads*"].

223. Troy, *Banning Ads*, *supra* note 222, at A27.

224. See *id.*

225. *Id.*

226. *Id.* See, e.g. *Master Settlement Agreement*, at <http://www.lawpublish.com/settle.html> (last visited Feb. 5, 2001).

227. Troy, *Banning Ads*, *supra* note 222, at A27.

tobacco companies "voluntarily" agreed to waive their First Amendment rights, the question over the constitutionality of tobacco advertising may not be a moot issue.²²⁸ Questioning the constitutionality of the conditions to which they have "voluntarily" agreed becomes the predicate issue.²²⁹ Tobacco companies would have to prove that they were coerced into waiving their First Amendment rights utilizing the unconstitutional conditions doctrine.²³⁰ If employed, the unconstitutional conditions doctrine may complicate any voluntary agreement affecting tobacco companies' rights under the First Amendment.²³¹

Noting that the government's interest in tobacco advertisements centers around the notion that they are "not good," Congress must heed the Court's determination that the primary reason for restricting commercial speech is to ensure that advertisements are not misleading.²³² Furthermore, Congress maintains that it has an interest in protecting minors from tobacco advertisements because such advertising condones an illegal act.²³³ However, the Court opines that restricting commercial speech should be the last response in any regulatory scheme, even when it pertains to a vulnerable group.²³⁴ While the government has a substantial interest in protecting minors, it may not advance broad regulations that impair the free flow of truthful information regarding lawful products for adults.²³⁵

228. See generally Barbara A. Noah, *Constitutional Qualms Concerning Governmental Restrictions on Tobacco Product Advertising*, 29 U. Tol. L. Rev. 637, 650-51 (1998).

229. *Id.*

230. *Id.* (setting forth the constitutional conditions doctrine as applied to tobacco advertising).

231. *Id.*

232. Troy, *Banning Ads*, *supra* note 222, at A27.

233. *Id.* But see generally *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173 (1999) (striking down casino advertising ban without raising the applicability to minors' interest and susceptibility); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1995) (striking down alcohol advertising restriction without raising the applicability to minors' interest and susceptibility).

234. The Court has stated:

It is true that we have repeatedly recognized the governmental interest in protecting children from harmful materials. See *Ginsberg v. New York*, 390 U. S., [629,] at 639 [(1968)]; [*Federal Communications Comm'n v. Pacifica Found.*], 438 U. S., [726,] 749 [(1978)]. "But that interest does not justify an unnecessarily broad suppression of speech addressed to adults. As we have explained, the Government may not "reduc[e] the adult population . . . to . . . only what is fit for children." *Denver [Area Educ. Telecomm. Consortium, Inc. v. Federal Communications Comm'n]*, 518 U.S. [727] at 759 [(1996)] (internal quotation marks omitted)(quoting *Sable [Communications of Cal., Inc. v. Federal Communications Comm'n]*, 492 U. S., [115] at 128 [(1989)]). "[R]egardless of the strength of the government's interest" in protecting children, "[t]he level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox." *Bolger v. Youngs Drug Products Corp.*, 463 U. S. 60, 74-75 (1983).

Reno v. ACLU, 521 U.S. 844, 875 (1997) (striking down provisions of the Communications Decency Act of 1996 that criminalized the transmission of material deemed "harmful to minors" over the Internet).

235. See Solange E. Bitol, Commentary, *Marketing Restriction in Tobacco Legislation are Unconstitutional*, 13 No. 12 ANDREWS TOBACCO INDUSTRY LITIGATION REP. 18 (1998).

Moreover, *Greater New Orleans* dictates, under the fourth prong of *Central Hudson*, that Congress address the root of any problem before considering the restriction of speech to be a viable alternative.²³⁶ Thus, before Congress can assert that commercial speech is its last response, Congress may want to try its hand at better enforcement—a more direct way of regulating the problem.²³⁷ For example, when existing laws are enforced, underage smoking is no longer an issue because minors may not purchase or acquire cigarettes.²³⁸ In addition to direct regulation, Congress may enter the marketplace of ideas via counterspeech and educate minors about the potential health and legal risks of smoking.²³⁹

C. Social Impact

Prior to the *Greater New Orleans* decision, casinos could only advertise the non-gaming aspects of their enterprise.²⁴⁰ As a result of *Greater New Orleans*, private casinos are able to unequivocally advertise information regarding the gaming aspects of their casinos and consumers are free to choose how they want to spend and gamble their money.²⁴¹

If commentators are correct in believing that geographic restriction do not apply to private casino advertising,²⁴² then casinos will have a national market at their disposal. As alluded to earlier, however, the Department of Justice and the FCC may have rendered this question moot with regard to the enforcement of federal law.²⁴³ Even if geographic restrictions did apply, it is still likely that gaming establishments would see more profits, due to the more pervasive advertising mediums at their disposal. However, casinos maintain that the public may not immediately see "beefed up" radio and television advertisement campaigns, but instead may see a shift from print ads to radio and television

236. See *supra* note 189 and accompanying text.

237. See *supra* note 189 and accompanying text.

238. If the government could prove that its attempts at regulating the underlying conduct were unsuccessful then it is possible that targeting tobacco advertising may serve as the last resort in advancing the government's substantial interest in protecting minors. See Andrew S. Gollin, Comment, *Improving the Odds of the Central Hudson Balancing Test: Restricting Commercial Speech as a Last Resort*, 81 Marq. L. Rev. 873, 911-12 (1998). See also Oral Argument for *Greater New Orleans v. United States*, available at 1999 WL 274986, *22-23; David C. Vladeck & John Cary Sims, *Why the Supreme Court will Uphold Strict Controls on Tobacco Advertising*, 22 S. Ill. U. L.J. 651, 664-65 (1998) (stating that the government has eviscerated its non-speech alternatives in protecting minors from smoking). But see Troy, *Banning Ads*, *supra* note 222, at A27 (stating that the government could deal with the problem of underage smoking more appropriately through stronger enforcement of access laws or depriving violators caught smoking of their drivers licenses).

239. Gollin, *supra* note 238, at 913-14.

240. Greenburg, *supra* note 220, at 4; Oral Argument for *Greater New Orleans v. United States*, available at 1999 WL 274986, *26-29. See also *supra* note 185 and accompanying text.

241. *Id.*

242. *Id.*; Richey, *supra* note 221, at 3. But see Halonen, *supra* note 220, at 3 (stating that it is unclear over the geographic restriction).

243. See *supra* note 214 and accompanying text.

advertisements.²⁴⁴

Casinos acknowledge that television advertising is too costly and its effect is too difficult to measure.²⁴⁵ Some casinos allege that the public will also see little change because of the recent advertising trend that markets casinos as "more than casinos," attracting a wider audience without alluding to the gaming aspects of the casino.²⁴⁶

Critics argue that *Greater New Orleans* places our society one step closer towards a complete acceptance of gambling and its associated social costs.²⁴⁷ Moreover, protecting children from the social ills of gambling will no doubt become more of an issue, given the pervasiveness of advertising on radio and television.²⁴⁸

VI. CONCLUSION

Although it appears that the Supreme Court has at least indirectly validated American capitalism and the free-market by allowing more information to enter the marketplace, federalism interests have definitely waned due to the ability of information to cross state borders from a single location. What is illegal in one jurisdiction may well be commonplace in all other jurisdictions. Moreover, as commercial information finds the path of least resistance through mediums such as cable, satellites, and the Internet, the Court is on its way to granting truthful, non-misleading advertisements full First Amendment protection. If Justice Thomas' concurrence is any indication, the practical result of the *Central Hudson* test, as it stands, may in effect give de facto full First Amendment protection to truthful, non-misleading commercial advertisements. It appears, however, that any significant, overt abolition of the commercial speech doctrine will not surface with the present Court.²⁴⁹ Nevertheless, if *Greater New Orleans* is to stand for

244. Halonen, *supra* note 220, at 3.

245. *Casinos react to a Supreme Court ruling*, BUS. NEWS N.J., June 21, 1999, at 11, available at 1999 WL 11719220.

246. *Id.*

247. Richey, *supra* note 221, at 3.

248. *See id.*

249. It appeared that Justice Stevens tempered his disposition on commercial speech from his opinion in *44 Liquormart* to his opinion in *Greater New Orleans* to solidify a majority of the Court on the issue of commercial speech, rather than risk treading new ground and another fragmented opinion. *See Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 182, 184, 187-89, 193 (1999); *44 Liquormart*

anything, it emphatically sends a message to Congress that limiting consumer choice through

restricting truthful, non-misleading speech will no longer serve as a plausible option for regulating an entire industry without first regulating the underlying conduct.

NICHOLAS P. CONSULA²⁵⁰

v. Rhode Island, 517 U.S. 484, 487-89 (1995).

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